IN THE

Supreme Court of the United States

OCTOBER TERM—1947

No. 535

LEON JOSEPHSON,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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CITATIONS

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Leon Josephson, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered December 9, 1947 (R. 230), affirming a judgment of conviction of the petitioner in the District Court for the Southern District of New York (R. 196).

Statement of the Matter Involved

The petitioner was charged in the indictment (R. 5) with the commission of an offense against the United States, Title 2, United States Code, Section 192. After arraignment and plea (R. 1), petitioner moved before trial to dismiss

the indictment (R. 6-10) upon grounds of constitutional and legal invalidity. The motion to dismiss was denied by the District Court (R. 195) with a written opinion (R. 190-194).

The trial took place before Hon. Alfred C. Coxe, a Judge of the District Court for the Southern District of New York, and a jury, on October 14 and 15, 1947 (R. 2). The motion to dismiss the indictment was renewed at the commencement of the trial (R. 13-45), and denied (R. 45). Motions for a direction of acquittal and dismissal of the indictment were made at the close of the Government's case (R. 91), and denied (R. 92). The same motions were again made at the close of the entire case (R. 125), with the same ruling (R. 126). The jury returned a verdict of guilty (R. 149). Motions for a new trial and in arrest of judgment were denied (R. 149).

The petitioner was sentenced to imprisonment for a period of twelve months and a fine of one thousand dollars (R. 163), on October 15, 1947 (R. 2). Bail was denied by the District Court (R. 163-168), but upon application to the United States Circuit Court of Appeals for the Second Circuit, petitioner was admitted to bail in the sum of $2,500 pending the determination of the appeal. Notice of appeal was filed on October 17, 1947 (R. 2) and amended notice of appeal (R. 197) was filed on October 20, 1947 (R. 2).

The cause was argued before the United States Circuit Court of Appeals for the Second Circuit on November 6, 1947 (R. 201). The decision of the Circuit Court was rendered on December 9, 1947 by a divided Court, Judge Clark dissenting (R. 201-230). Judgment was entered on December 9, 1947 (R. 230).

By stipulation of counsel, and upon the order of Hon. Augustus N. Hand, a Justice of the Circuit Court, dated December 15, 1947, the bail of the petitioner was continued

pending the determination of this application for a writ of certiorari. On December 23, 1947, Mr. Justice JACKSON extended the time for filing a petition for writ of certiorari until January 20, 1948 (R. 231).

The House Committee on Un-American Activities as presently constituted was established by Section 121(q)(1) of the Legislative Reorganization Act of 1946, Public Law 601, 79th Cong., 2d Sess., Ch. 753, which was later adopted as a Rule of the House on January 3, 1947 (H. Res. 5, 93 Cong. Rec. 36).[1] As the prosecutor stated at the trial, Public Law 601 is "the law creating this committee, and under which it acts, and which defines its scope" (R. 90).

On March 5, 1947, the petitioner appeared in New York City before a sub-committee of the Committee on Un-American Activities (R. 56). Before he was sworn, he stated that he wished "to make a motion contesting the constitutionality" of the Committee (Deft.'s Exh. A-1, R. 177; 99). The Chairman inquired whether he refused to be sworn on the ground that he contested the legality of the Committee, and the petitioner replied in the affirmative (R. 178). Counsel for the petitioner who accompanied him to the hearing then presented a statement in written form (R. 178) outlining the legal position of the petitioner (Deft.'s Exh. C, R. 183-187; 109). Petitioner declined to be sworn and to give testimony before the Committee until its legality had been determined (R. 181). The matter was thereafter certified to the United States Attorney for the Southern District of New York (R. 173), and the indictment here followed.

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1. The present Committee is the successor, without change in language or authority, of the Dies and Wood-Rankin Committees of prior Congresses. The functions and powers of the Committee and its predecessors are identical. See H. Res. 282, 75th Cong. 2d Sess.; 83 Cong. Rec. 7568, 7586 (1938); H. Res. 26, 76th Cong. 1st Sess.; 84 Cong. Rec. 1098, 1128 (1939); H. Res. 321, 76th Cong. 3d Sess.; 86 Cong. Rec. 572, 605 (1940); H. Res. 90, 77th Cong. 1st Sess.; 87 Cong. Rec. 886, 899 (1941); H. Res. 420, 77th Cong. 2d Sess., 88 Cong. Rec. 2282, 2297 (1942); H. Res. 65, 78th Cong. 1st Sess.; 89 Cong. Rec. 795, 810 (1943); H. Res. 5, 79th Cong. 1st Sess.; 91 Cong. Rec. 10, 15 (1945).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on December 9, 1947 (R. 230). On December 23, 1947, Mr. Justice JACKSON extended the time for filing a petition for writ of certiorari until January 20, 1948 (R. 231). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 United States Code, Section 347); Federal Rules of Criminal Procedure, Rule 37(b) (18 United States Code, foll. Section 687).

Statutes and Resolution Involved

(a) Rev. Stats. Sec. 102, as amended by c. 594, Act of June 22, 1938, 52 Stat. 942, U. S. C. Title 2, Sec. 192:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.
>
> * * * * *

(b) Sec. 121(q)(1), Legislative Reorganization Act of 1946, P. L. 601, c. 753, 79th Cong., 2d Sess., 60 Stat. 828:

> The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make

from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman and may be served by any person designated by any such chairman or member.

* * * * *

(c) On January 3, 1947, the House of Representatives by resolution (H. Res. 5) adopted as the rules of the House "all applicable provisions of the Legislative Reorganization Act of 1946" and the rules of the House of Representatives of the Seventy-ninth Congress as the rules of the House of the Eightieth Congress (93 Cong. Rec. 36).

Questions Presented

1. Whether the provisions of Public Law 601 and House Resolution 5 creating a standing committee of the House known as the Committee on Un-American Activities abridge petitioner's freedom of speech, press and religion, as well as the right to peaceably assemble and petition for redress of grievances, in violation of the First Amendment to the Constitution of the United States.

2. Whether the authority vested in the House Committee on Un-American Activities by Public Law 601 and House Resolution 5 exceeds the enumerated powers of Congress, in violation of the Ninth and Tenth Amendments to the Constitution of the United States.

3. Whether the contempt statute (Title 2, United States Code, Section 192) as applied to punish the withholding of testimony from the House Committee on Un-American Activities acting under the authority granted by Public Law 601 and House Resolution 5 fails to provide an ascertainable standard of guilt, in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

4. Whether the availability and use of process to compel testimony under the standards provided in Public Law 601 and House Resolution 5 violate the provisions of the Fourth Amendment to the Constitution of the United States prohibiting unreasonable searches and seizures.

5. Whether Public Law 601 and House Resolution 5 as construed and applied abridge petitioner's freedom of speech, press and religion, as well as the right to peaceably assemble and petition for redress of grievances, in violation of the First Amendment to the Constitution of the United States.

6. Whether the provisions of Public Law 601 and House Resolution 5 as construed and applied exceed the enumerated powers of Congress, in violation of the Ninth and Tenth Amendments to the Constitution of the United States.

7. Whether the provisions of Public Law 601 and House Resolution 5 as construed and applied deprive the petitioner of liberty and property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

8. Whether Public Law 601 and House Resolution 5 as construed and applied is a bill of attainder, in violation of Article I, Section 9 of the Constitution of the United States.

9. Whether the petitioner may assert the claim that Public Law 601 and House Resolution 5 on their face provide no ascertainable standard of guilt in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

10. Whether the indictment states an offense within the purview of the contempt statute (Title 2, United States Code, Section 192).

11. Whether the proof adduced at the trial established the commission of an offense.

12. Whether the trial Court erred in its charge to the jury "that the mere fact that no questions were put to him at that time is no defense in this particular indictment" (R. 142, 148); and in further charging the jury that "Intentional violation is sufficient to constitute guilt" (R. 140, 144); and in its refusal to charge the jury that they must find the petitioner not guilty if they were satisfied that he had not been lawfully summoned to the inquiry (R. 144).

Reasons Relied on for Allowance of the Writ

1. This is the first time in which the provisions of the Legislative Reorganization Act of 1946 and House Resolution 5, creating the Committee on Un-American Activities, have been construed by a Circuit Court of Appeals. In construing this statute, a majority of the Court below held that it did not conflict with the Bill of Rights contained in the Constitution. The majority of the Court conceded that the issue raised was "exceedingly important" (R. 212). The dissenting opinion of Judge CLARK took an opposite view of the basic question. Holding that the issue was "one of the more momentous which has come before us" (R. 216), Judge CLARK found that the statute was incompatible with the First Amendment. The construction of the provisions of law creating the House Committee on Un-American Activities is an important question of federal law which has not been, but should be, settled by this Court.

2. The Circuit Court has decided, it is respectfully submitted, a federal question in a way probably in conflict with applicable decisions of this Court. The statute authorizes inquiry into "propaganda" which is "un-American," "subversive," or which attacks "the principle of the form of government as guaranteed by our Constitution." It authorizes, therefore, a sweeping inquiry into ideas, into thought and expression, into opinions and beliefs, all of which, as this Court has on numerous occasions decided, constitute an exercise of freedom of speech, press, religion, assembly or petition for redress of grievances within the protection of the First Amendment.[2] Contrary to the rul-

2. *Stromberg* v. *California*, 283 U. S. 359 (1931); *De Jonge* v. *Oregon*, 299 U. S. 353 (1937); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *Palko* v. *Connecticut*, 302 U. S. 319 (1937); *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Bridges* v. *California*, 314 U. S. 252 (1941); *Board of Education* v. *Barnette*, 319 U. S. 624 (1943); *Schneiderman* v. *United States*, 320 U. S. 118 (1943); *United States* v. *Ballard*, 322 U. S. 78 (1944); *Thomas* v. *Collins*, 323 U. S. 516 (1945).

ings of this Court, the Circuit Court has upheld a statute whose terms result "in a continuous and pervasive restraint on all freedom of discussion." *Thornhill* v. *Alabama*, 310 U. S. 88, 98 (1940).

3. The Circuit Court applied the penal statute (Title 2, United States Code, Section 192) to punish the withholding of testimony from the House Committee under its grant of power in a manner contrary to the applicable decisions of this Court. It held, first, that the contention that the contempt statute and authorizing act, when read together, were so vague and indefinite as to be unconstitutional was not available to the petitioner; and, second, that the language of the authorizing statute permits at least the investigation of one specified idea which would have been pertinent to the inquiry. It conceded that "the vice of vagueness in that language, if any, lies in the possibility that it may authorize, though we do not decide that it does so, investigations relating to the advocacy of peaceful changes" (R. 207). The dissenting Judge held that the questions could properly be raised by the petitioner (R. 227); and that the standards provided in the statute were "vague, and doubtful" and should be adjudged insufficient (R. 223). This Court has constantly ruled that the terms of a penal statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. *Connally* v. *General Construction Co.*, 269 U. S. 385 (1926); *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 (1921); *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939); *M. Kraus & Bros.* v. *United States*, 327 U. S. 614 (1946). Especially has this Court so held where the vague and indefinite standards contained in the statute permitted the punishment of the use of the freedoms contained in the First Amendment. *Stromberg* v. *California*, 283 U. S. 359 (1931); *Herndon* v. *Lowry*, 301 U. S. 242 (1937). Moreover, this Court has upheld the right of defendants in similar instances to test the

constitutionality of the statute on its face. *Smith* v. *Cahoon*, 283 U. S. 553 (1931); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Thomas* v. *Collins*, 323 U. S. 516 (1945); *Ex Parte Fisk*, 113 U. S. 713 (1885). The Circuit Court has decided these federal questions, it is respectfully submitted, in a way probably in conflict with applicable decisions of this Court.

4. The Circuit Court held in effect that the Congress possesses a limitless power of inquiry. Judge CLARK, in his dissenting opinion, stated: "If this is legally permissible, it can be asserted dogmatically that investigation of private opinion is not really prohibited under the Bill of Rights" (R. 217). This extraordinary grant of power over the beliefs and ideas of private citizens has never been countenanced by this Court. It places governmental power over and above the Constitution. See *Kilbourn* v. *Thompson*, 103 U. S. 168 (1880); *In re Chapman*, 166 U. S. 61 (1896); *McGrain* v. *Daugherty*, 273 U. S. 135 (1926); *Sinclair* v. *United States*, 279 U. S. 263 (1928); *Jones* v. *Securities Commission*, 298 U. S. 1 (1935). The decision of the Circuit Court on this significant federal question is probably in conflict with applicable decisions of this Court.

5. The decision of the Circuit Court suggesting that the Committee's authority can be saved by a construction narrowing its jurisdiction usurps the legislative function and is contrary to this Court's concept of separability, for the legislation contains no ascertainable standard to which the Committee may be confined by judicial interpretation. *United States* v. *Reese*, 92 U. S. 214 (1875); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940). The decision of the Circuit Court is therefore probably in conflict with the applicable decisions of this Court.

6. The construction of the contempt statute (Title 2, United States Code, Section 192) by the Circuit Court appears contrary to the decisions of this Court and the legisla-

tive intent. This Court held in *United States* v. *Murdock*, 290 U. S. 389 (1933) that the statute describes two distinct offenses in the disjunctive: one, a willful default in appearance after summons; two, refusal to answer any question pertinent to the question under inquiry. The petitioner was not charged in the indictment here with the commission of either of these two offenses (R. 5). The prosecutor specifically stated that petitioner was not charged with a willful default (R. 43). Had the petitioner been charged with a willful default in appearance (compare *Townsend* v. *United States*, 95 F. (2d) 352 (Ct. of App. D. C., 1938), *cert. den.* 303 U. S. 664, 1938), the defenses that his default was not willful and that he had not been lawfully summoned to the inquiry would have been available to him. The trial Court in its charge took these issues away from the jury (R. 139-142). See also, *Hartzell* v. *United States*, 322 U. S. 680 (1943); *Screws* v. *United States*, 325 U. S. 91 (1945). Although petitioner was not charged with refusal to answer any specific question pertinent to the question under inquiry, nor did the proof at the trial establish such refusal, he has nevertheless been convicted of the crime of refusing to answer a question pertinent to the inquiry. "Conviction upon a charge not made would be sheer denial of due process." *De Jonge* v. *Oregon*, 299 U. S. 353, 362 (1937). This Court has held that it is "incumbent upon the United States to plead and show that the question pertained to some matter under investigation." *Sinclair* v. *United States*, 279 U. S. 263, 296 (1928). The decision of the Circuit Court appears to be in conflict with the decision in the *Townsend* case, *supra*, and with the applicable decisions of this Court.

7. This decision of the Circuit Court raises, as we have heretofore indicated, important questions of federal law which should be settled by this Court. Federal questions have been decided in a way probably in conflict with applicable decisions of this Court. The questions raised

here are ones of substance and general importance relating to the construction and application of a statute under the Constitution which has not been, but should be, settled by this Court.

All of the aforesaid reasons, however, do not manifest entirely the transcending importance of the issue here. The statute here, as applied and construed by the Committee, threatens not only the Constitution, but the American way of life, threatens the substitution of a coerced conformity for unlimited freedom of discussion. The Committee has indicated its preference for the advocates and advocacy of status quo, and regression; it is opposed to the advocacy of social change. As Judge CLARK put it: "It invites and justifies an attempt to enforce conformity of political thinking, to penalize the new and the original, to label as subversive or un-American the attempt to devise new approaches for the public welfare, in short to damn that very kind of initiative in experimentation which has made our democracy grow and flourish" (R. 223). The Committee in actuality has set itself up as a permanent inquisitional body serving as the "grand jury" of America (91 Cong. Rec. 275). It has compiled a blacklist of over 1,000,000 names (77th Congress, 2nd Sess., H. R. 2748) and the Chairman of the Committee recently testified[3] that "it is increasing all the time." It believes it may read the statute and "put whatever interpretation" it sees fit upon it "without any limitation" (75th Cong. 1st Sess., Cong. Rec. 3285). It has attacked countless numbers of Americans, public leaders, statesmen, scientists, teachers, artists, government officials, labor leaders, and plain American men and women as "subversive" and "un-American." Political, religious, and civic organizations of the widest variety have been stamped as "disloyal." Ideas of social change of every conceivable nature have been held by this Committee to be "un-American propaganda." It openly seeks

3. *United States* v. *Penris*, Ct. of App. D. C., June, 1947, No. 9597. Joint Appendix 189.

the persecution of persons whose ideas it opposes, seeks to deprive them of employment in private or public industry, and to impose criminal sanctions wherever possible. The Committee on Un-American Activities has been guilty of illegal searches and seizures (*Reeve* v. *Howe*, 33 F. Supp. 619 (D. C. E. D. Pa., 1940); *United States* v. *Blumberg*, unreported, (D. C. Dist. of Col., 1940, Cr. No. 65,800)). It has been guilty of unlawful arrests (*United States* v. *Dolson*, unreported, D. C. Dist. of Col., 1946, Cr. No. 65,801), and the initiation of criminal proceedings without regard to the requirements of law (*Ex Parte Frankfeld*, 32 F. Supp. 915, D. C. Dist. of Col., 1940). It has conducted its hearings as if they were criminal trials with utter disregard for elementary rules of impartiality and fairness, and without providing a single procedural safeguard which the law traditionally provides for accused persons. Much of the aforesaid was commented upon by Judge CLARK in his dissenting opinion.

Resistance to this rising tide of political intolerance and hysteria has grown. At least twenty-six persons already face imprisonment or trial for their opposition to this Committee. The Committee was condemned by important segments of the public press, here and abroad, during its recent inquiry into the motion picture industry. Its activities have been decried by countless public spirited citizens and organizations. Nevertheless, it continues on its course, threatening further inquiries into the beliefs and opinions of the foreign born, the Negro people, our educational institutions, the trade union movement, and other spheres of American life (Herald Tribune, January 8, 1948).

This Court is the last remaining constitutional protection against these assaults upon civil liberty. If the imprimatur of approval is placed upon this Committee, the Bill of Rights will become only a series of meaningless phrases.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

January, 1948.

LEON JOSEPHSON,
Petitioner.

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UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the District Court (R. 190-194) and the opinion of the Circuit Court (R. 201-230) are unreported.

Jurisdiction

The basis for this Court's jurisdiction are set forth in the petition.

Specifications of Errors

1. The Circuit Court erred in holding that Public Law 601 and House Resolution 5 on their face, and as applied and construed, did not deprive petitioner of rights secured to him by the provisions of the First, Fourth, Fifth, Sixth,

Ninth and Tenth Amendments to the Constitution, as well as Article 1, Section 9 of the Constitution.

2. The Circuit Court erred in holding that the petitioner may not assert the claim that Public Law 601 and House Resolution 5 provide no ascertainable standard of guilt in violation of the Fifth and Sixth Amendments to the Constitution.

3. The Circuit Court erred in failing to reverse the conviction of the petitioner upon the grounds that the indictment failed to state an offense against the laws of the United States; that the proof failed to establish the commission of such an offense; and that the charge of the trial Court was erroneous.

The specifications of errors are detailed in the questions presented in the petition.

Summary of Argument

Public Law 601 and House Resolution 5 authorize a limitless inquiry into the propagation of ideas. The main traditions of American history, legal and political, are freedom of ideas, freedom of speech and press, of religion, of proposal of change, of independent intellectual self-assertion unrestricted by governmental action. The statute here results in a continuous restraint upon all freedom of discussion. Governmental inquiry into ideas and governmental classification of ideas are as much abridgements of the freedoms guaranteed by the Constitution as direct prohibitions. The "clear and present danger" doctrine is not a limitation upon the First Amendment. It is a "working principle" to determine the appropriate area where governmental power may impinge, and the area which is free from all governmental intrusion. It is in the realm of action, of unlawful conduct, that government may operate. It possesses no power to intrude into the domain

of ideas and beliefs. The statute here affects precisely the area which the Constitution protects from governmental action. There is no possibility of sustaining the Committee's authority by judicial construction for it would entail the writing of an entirely different enactment. The Circuit Court appears to attribute powers to the Congress nowhere contained in the Constitution. The language of the authorizing statute is vague and undefined. It provides no explicit standards. This Court has always held that penal statutes, especially in the areas of opinion and belief, will not be upheld when they provide no ascertainable standard of guilt. The petitioner may press this issue. The statute as applied and construed violates the Bill of Rights. The use of process to compel testimony without adequate foreknown standards for the inquiry, violates the Fourth Amendment's prohibition of unreasonable searches and seizures. The Committee, acting under its unlimited authority of inquiry may, and does, impose control over thought and expression. The indictment and proof failed to establish the commission of an offense within the purview of Title 2, United States Code, Section 192. The charge of the trial Court was erroneous.

ARGUMENT

I

The provisions of the Legislative Reorganization Act of 1946 and House Resolution 5 creating a standing committee of the House known as the Committee on Un-American Activities are unconstitutional.

(a) "Legislatures have no right to set up an inquisition, and examine into the private opinions of men" (Letter of Oliver Ellsworth to The Connecticut Courant, December 17, 1787 in Scott, The Federalist and other Con-

temporary Papers on the Constitution of the United States (1894), p. 583). The view that freedom of thought and expression unrestricted by governmental action was the essence of liberty found common acceptance by the founding fathers. The men who read the works of Tom Paine as they fought a despotic king believed that the dissemination of ideas, propagandizing by speech or press was a liberty which should be protected from governmental infringement "because they knew of no other way by which free men could conduct representative democracy," *Thomas* v. *Collins*, 323 U. S. 516, 545 (1945). They understood that freedom of thought and speech was "the matrix, the indispensable condition of nearly every other form of freedom," *Palko* v. *Connecticut*, 302 U. S. 319, 327 (1937). The authority of the Declaration of Independence rested on those "harmonizing sentiments" of the day (Writings of Thomas Jefferson (Ed. 1869), VIII, p. 407). Those feelings arose, not alone from the readings of Aristotle, Cicero, Locke, Sidney, etc., but out of the bitter experiences suffered by the colonists at the hands of the Royal and State governments (Warren, C. Congress, the Constitution and the Supreme Court (1935), p. 81).

The Constitution was intended to devise a form of government in which political power would cease to be arbitrary and excessive by being strictly limited in scope. As originally adopted it contained no Bill of Rights, this out of fear that any enumeration of freedoms would by implication be construed to exclude others not mentioned. "For why declare that things shall not be done which there is no power to do?" The Federalist, Number 84 (Heritage Press, 1945), page 576.

The belief in the power of reason as applied through unrestricted public discussion is indelibly marked in American history. It was evidenced in the struggle of the people led by Jefferson and Madison against the Alien and Sedition Laws (Bassett, J. S., *The Federalist System* in The

American Nation (1906), Vol. XI). A learned author writes that only with the election of Jefferson in 1800 could it be stated "that the real American Revolution had triumphed," Bowers, C. G., *Jefferson and Hamilton* (N. Y. 1925), page 510. It was evidenced in the struggles of the abolitionists prior to the Civil War; in the struggles against the Palmer Raids of the 1920's (Report upon the Illegal Practices of the United States Department of Justice, Washington, D. C., National Popular Government League, May, 1920); in the struggles against "criminal syndicalism" laws and "loyalty oaths" which followed in the backwash of World War I.

The main traditions of American history, therefore,—of our way of life—are freedom of speech, and of the press, of religion, of proposal of change, of independent intellectual self-assertion. Whatever intrusions there have been upon these liberties, "the claims of freedom have even more constantly asserted themselves," Cheney, E. P., *Freedom and Restraint* in Annals of the Academy of Political and Social Science (1938), Volume 200, page 4.

(b) The statute here, authorizing as it does an inquiry into the "extent, character and objects of un-American propaganda activities in the United States" constitutes in reality a limitless inquiry solely into opinion and belief. As Judge CLARK notes: ". . . neither the legislative authority nor the actions pursuant to it suggest or permit any limitations on the investigation of the spoken or written word" (R. 221). The majority opinion concedes that such a conclusion is possible (R. 207). The character of the evil inherent in such sweeping governmental inquisition is no different from that contained in the licensing and penal statutes which this Court has stricken down (*Thornhill* v. *Alabama*, 310 U. S. 88, 1940). The statute "results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview" (*supra*, p. 98).

(c) In a line of cases from *Kilbourn* v. *Thompson*, 103 U. S. 168 (1880) to *Jones* v. *Securities Commission*, 298 U. S. 1 (1935), this Court has held that governmental inquiry into thought and expression constitutes official action, as burdensome as direct prohibition (see, particularly, *Sinclair* v. *United States*, 279 U. S. 263 (1928) and *United States* v. *Ballard*, 322 U. S. 78, 1944). The Circuit Court's view that the inquiry may be sustained so long as legislation restricting civil liberties is not enacted is, therefore, it is respectfully submitted, erroneous. Governmental inquiry into speech and governmental classification of speech are themselves abridgements of speech (*United States* v. *Ballard*, 322 U. S. 78 (1944); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Thomas* v. *Collins*, 323 U. S. 516 (1945)).

(d) The "clear and present danger" doctrine enunciated by this Court is not, as the majority opinion of the Circuit Court appears to indicate, a limitation upon the First Amendment. The First Amendment "embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be," *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940). The clear and present danger doctrine is a "working principle" to determine where one domain begins and the other ends. *Bridges* v. *California*, 314 U. S. 252 (1941). The statute here is not directed against the domain of unlawful acts and conduct (*Thornhill* v. *Alabama*, 310 U. S. 88, 104, 1940). It is pointed at the domain of belief and opinion, sweeping into its orbit every idea of social, economic and political change. Into this area, government may not intrude (*Thomas* v. *Collins*, 323 U. S. 516, 529, 1945).

(e) The peripheral reasons advanced by the Circuit Court to sustain the statute are, it is respectfully submitted, without validity. The Committee's authority cannot be saved by judicial construction. To do so would usurp the legislative function (*United States* v. *Reese*, 92 U. S. 214, 1876), entailing as it would the writing of an entirely

different enactment. The suggestion that the power to investigate is broader than the power to legislate means only that a lawful inquiry may be as detailed and searching as human ingenuity will permit. Legislation, and inquiry, however, have limits marked by the Constitution (*Jones* v. *Securities Commission*, 298 U. S. 1, 1935). The Circuit Court suggests that the Committee may investigate opinions and beliefs in order to determine "how far it can go before it transgresses the boundaries established by the Constitution" (R. 214). An alleged lawful end cannot be accomplished by unconstitutional means. A legislature may not abridge by inquiry a citizen's private beliefs in order to determine whether it should abridge the citizen's private beliefs by legislation (*Sinclair* v. *United States*, 279 U. S. 263, 293, 1929). The Circuit Court believes "exposure" of ideas is salutary. The testing of ideas in the free market place of thought and expression is the essence of our constitutional system. Compulsory exposure of opinions and beliefs is unknown to it (*West Va. State Board of Education* v. *Barnette*, 319 U. S. 624, 1943). There are not involved here inquiries of a census taker, statements of an applicant for second-class mailing privileges, or other reports and statements of a similar character. We deal here with the compulsory disclosure of ideas, opinions and beliefs. There is no reason to suppose that a decision invalidating the statute here will frustrate lawful legislative inquiries. To enforce the Bill of Rights today "is not to choose weak government over strong government" *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 636 (1943). As Judge CLARK stated: "Friends and supporters of the congressional power may well fear its present exercise here and find the application of a proper restraint a source of strength in the long run, rather than the reverse" (R. 230).

(f) The contempt statute punishes only the withholding of pertinent testimony. The vague language of the authorizing statute makes it impossible to determine what is

or is not pertinent to the Committee's jurisdiction. The disagreement among the judges of the Circuit Court on the meaning of its terms emphasizes the issue. The words "subversive" or "un-American" do not have any technical or other special meaning; no well-settled common law meaning (compare, *Connally* v. *General Construction Co.*, 269 U. S. 385, 1926). Resort to dictionary definitions, the statute itself, the construction by the Committee, the construction by the Congress all are fruitless sources of inquiry when it comes to determining what the meaning of the epithets attached to the word "propaganda" signify. The Circuit Court infers that "a man's fate depends on his estimating rightly" (R. 207). Even in the realm of unlawful conduct, a statute must nevertheless contain explicit standards (*Lanzetta* v. *New Jersey*, 306 U. S. 451, 1939); more so in the area of speech, beliefs, ideas, principles and doctrines. The statute here "amounts merely to a dragnet which may enmesh anyone" who advocates social change, no matter how significant or insignificant that change may be (*Herndon* v. *Lowry*, 301 U. S. 242, 263, 1937). That the petitioner may press this issue is well established (*Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Smith* v. *Cahoon*, 283 U. S. 553 (1931); *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *McGrain* v. *Daugherty*, 273 U. S. 135 (1927); *Thomas* v. *Collins*, 323 U. S. 516 (1945); *Ex Parte Sawyer*, 124 U. S. 200 (1888); *Ex Parte Rowland*, 104 U. S. 604 (1882); *Ex Parte Fisk*, 113 U. S. 713 (1885). Nor is there any available remedy to judicially test the validity of process issued by the Committee (compare, *Yakus* v. *United States*, 321 U. S. 414, 437, 1944).

(g) The statute as applied and construed violates the Bill of Rights. The consequences which flow from the arbitrary invasion by government into constitutionally protected freedoms are best exemplified in the conduct of the Committee. The Committee's unlimited authority of inquiry enables it, and it does, impose control over thought

and expression. Its avowed primary function is the "exposure" of ideas—in reality, the imposition of a political censorship of all opinion and expression (H. R. Rep. No. 2, 76th Cong., 1st Sess. 13 (1939); H. R. Rep. No. 1, 77th Cong., 1st Sess. 24 (1941); H. R. Rep. No. 2742, 79th Cong., 2d Sess., 16 (1947)). It suppresses ideas by "blacklisting" the ideas (H. R. 2, 76th Cong., 1st Sess., Jan. 1939; H. R. 2233, 79th Cong., 2d Sess., 1947) and by "blacklisting" the individuals and organizations who espouse them (H. R. 2748, 77th Cong., 2d Sess., 1941). It has openly stated its purpose and attempts to eliminate from both public and private employment all persons whose ideas it condemns (9 Hearings 5447 (1939); Note, p. 418). Such avowed function of the Committee violates Article I, Section 9 of the Constitution for its construction of the statute renders the law a bill of attainder (compare *United States* v. *Lovett*, 328 U. S. 303, 1946). A leading member of the Committee, John E. Rankin, stated: "I serve notice on the un-American elements in this country now that this 'grand jury' will be in session to investigate un-American activities at all times" (91 Cong. Rec. 275, 1945). It has officially attributed its compilation of its blacklist to its subpoena powers (H. R. Rep. 2748, 77th Cong., 2d Sess., 1943, p. 213). The availability and use of process to compel testimony, without adequate, foreknown standards for the inquiry, violate the Fourth Amendment's prohibition of unreasonable searches and seizures (*Jones* v. *Securities Commission*, 298 U. S. 1, 1935). The Courts have had occasion to comment upon the illegal means employed by the Committee (*Reeve* v. *Howe*, 33 F. Supp. 619, D. C. E. D. Pa., 1940; *United States* v. *Blumberg*, unreported, D. C. Dist. of Col., 1940, Cr. No. 65,800; *United States* v. *Dolson*, unreported, D. C. Dist. of Col., 1946, Cr. No. 65,801; *Ex Parte Frankfeld*, 32 F. Supp. 915, D. C. Dist. of Col., 1940). It conducts its hearings like a criminal trial, declaring in advance what persons, ideas and groups it believes to be evil; presenting witnesses to support its "views" or "accu-

sations"; calling upon citizens under oath to deny or affirm the "accusations," and then calling, by way of judgment, for the prosecution and persecution of persons and ideas whom it believes should be swept from the scene—all of this without any of the procedural safeguards to which Judge CLARK referred in his opinion (R. 228). "Civilized standards of procedure and evidence" are unknown to the Committee (compare *McNabb* v. *United States*, 318 U. S. 332, 340, 1943). This Court has said (*Jones* v. *Securities Commission*, 298 U. S. 1, 27, 1936):

> "A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing where the practice under it would end."

II

The indictment and proof failed to establish the commission of an offense within the purview of Title 2, United States Code, Section 192. The charge of the trial Court was erroneous.

In *Murdock* v. *United States*, 290 U. S. 389 (1933), this Court held that the contempt statute describes two distinct offenses in the disjunctive. One offense is a willful default in appearance after lawful summons. The other offense is a refusal to answer any question pertinent to the question under inquiry after appearance. The indictment does not charge the commission of either of these two offenses (R. 5).

(a) The prosecutor specifically stated that petitioner was not charged with a willful default (R. 43). Yet, in *Townsend* v. *United States*, 95 F. (2d) 352, 357 (Ct. of App. D. C., 1938), *cert. den.* 303 U. S. 664, 1938), the withholding of testimony after appearance was held to constitute a willful default within the purview of the first section of the contempt statute. Had this charge been laid against petitioner, he would have had available to him the defenses that his default was not willful and that he had not been lawfully summoned to the inquiry. The trial Court in its charge removed these issues from the jury (R. 139-142); the Circuit Court regarded the allegation of "lawful summons" in the indictment as surplusage and upheld the failure of the trial Court to submit the issue to the jury (R. 204). These rulings, it is respectfully submitted, were substantially erroneous for they virtually deprived the petitioner of a jury trial. Especially was this true on the issue of willfulness. This case is unlike *Fields* v. *United States*, 164 F. (2d) 97 (Ct. of App. D. C., 1947) *cert. den.* January 12, 1948. The authorizing statute here is a vague and undefined resolution empowering the Committee to inquire broadly into propagation of ideas. The defendant challenged the lawfulness of such an inquiry. He justified the withholding of his testimony before the Committee by asserting rights guaranteed to him by the Constitution. In the context of this authorizing enactment (Public Law 601), the application of the contempt statute required a different construction of the word "willful" from the one made in the *Fields* case, and required submission of the issue to the jury. This view is supported by the decisions of this Court in *Hartzell* v. *United States*, 322 U. S. 680 (1944) and *Screws* v. *United States*, 325 U. S. 91 (1945).

(b) The petitioner was not charged with refusal to answer any specific question pertinent to the question under inquiry, nor did the proof at the trial establish such refusal. The Circuit Court's view that some pertinent question

might have been put begs the issue. For if, concededly, no question was put, the United States was unable "to plead and show that the question pertained to some matter under investigation" (*Sinclair* v. *United States*, 279 U. S. 263, 296, 1928), and an offense under the second section of the contempt statute was not established. This in no way frustrates the purpose of the contempt statute. It merely requires that the charge be properly laid under the appropriate section of the statute, so that the accused shall not be deprived of defenses afforded him by law.

Conclusion

The decision of the Circuit Court involves important questions of federal law which have not been, but should be, settled by this Court. Federal questions have been decided in a way probably in conflict with applicable decisions of this Court. The questions raised here are ones of substance and general importance, involving as they do, the construction and application of a statute under the Constitution which affects the entire Nation. Wherefore, the petitioner prays that a writ of certiorari issue to the Circuit Court of Appeals for the Second Circuit to review its judgment and decree.

Respectfully submitted,

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INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 535

LEON JOSEPHSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The majority (R. 201–216) and dissenting (R. 216–230) opinions in the circuit court of appeals are not yet reported. The opinion of the district court appears at R. 190–194.

JURISDICTION

The judgment of the circuit court of appeals was entered December 9, 1947 (R. 230). On December 23, 1947, Mr. Justice Jackson extended the time for filing a petition for a writ of certiorari through January 20, 1948 (R. 231). The petition for a writ of certiorari was filed January

17, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether, having appeared before a legislative subcommittee and having refused to be sworn and to answer any questions, petitioner has standing to challenge the authority of the subcommittee to propound a pertinent question to him.

2. Whether Public Law 601, prescribing the authority of the Committee, is unconstitutional.

3. Whether petitioner, having appeared before the committee, was properly prosecuted for having violated the second clause of R. S. § 102, which punishes the refusal to answer any question pertinent to the inquiry—or whether he should have been prosecuted under the first clause, which punishes the willful failure to respond to a summons of the Committee.

STATUTES AND RESOLUTION INVOLVED

Rev. Stat. § 102 (1875), as amended, 52 Stat. 942, 2 U. S. C. 192 provides:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or

> concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

House of Representatives Rule XI (q) (2), as amended by Section 121 (b) of the Legislative Reorganization Act of 1946, Pub. L. No. 601, 79th Cong., 2d Sess., 60 Stat. 812, 828 (adopted by House of Representatives, 80th Congress, H. Res. No. 5, 80th Cong., 1st Sess.), provides:

> The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.
>
> The Committee on Un-American Activities shall report to the House (or to the

Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.

STATEMENT

On May 1, 1947, petitioner was indicted in the United States District Court for the Southern District of New York in one count charging a violation of R. S. § 102. The indictment (R. 5) is in the following terms:

The Grand Jury charges:

(1) Pursuant to Public Law 601, 79th Congress, and House Resolution 5, 80th Congress, dated January 3, 1947, including the Rules of Congress therein adopted and amended, the House of Representatives

was empowered to and did create the Committee on Un-American Activities, having duties and powers as set forth in said Resolution.

(2) On the 5th day of March, 1947, at the Southern District of New York, Leon Josephson was summoned as a witness, by authority of the House of Representatives through its Sub-Committee of the Committee on Un-American Activities, to be sworn and to testify before the said Sub-Committee on matters of inquiry committed to said Committee.

(3) Leon Josephson did appear before the said Sub-Committee, pursuant to subpoena served upon him, at its session in the Federal Court Building, Southern District of New York, on March 5, 1947, but then and there refused to be sworn and to give any testimony before said Committee (Title 2, United States Code, Section 192).

The facts established at petitioner's trial are not in dispute. Petitioner is a member of the bar of New Jersey (R. 112–113). On February 4, 1947, a subpoena issued by the House Un-American Activities Committee was served on petitioner directing him to appear before the Committee in Washington on February 6, 1947 (R. 179). On February 5, petitioner sent the following telegram to the Committee (R. 176):

J. Parnell Thomas, Chairman, House Committee on Un-American Activities,

> Room 226, Old House Office Building. Unable appear before your Committee February 6th, due inadequate notice of less than 48 hours. Counsel advises me such short notice unreasonable and that I am entitled to reasonable notice. Willing appear at later date fixed by you if reasonable notice given me. Leon Josephson.

Arrangements were thereafter made for the appearance of petitioner before a sub-committee in New York City on March 5, 1947 (see R. 183). On that day petitioner was served with an additional subpoena (R. 79–81, 174), and he appeared before the sub-committee with counsel (R. 56, 177–178). He refused to be sworn (R. 56, 60, 64, 177–178, 180–181) and he refused to answer any questions (R. 56, 60, 64, 177, 181). The following is illustrative (R. 180–181):

> The CHAIRMAN. Mr. Josephson, will you stand and be sworn?
>
> Mr. JOSEPHSON. I will not be sworn.
>
> Mr. STRIPLING. Will you stand?
>
> Mr. JOSEPHSON. I will stand.
>
> (Mr. Josephson stands.)
>
> Mr. STRIPLING. Do you refuse to be sworn?
>
> Mr. JOSEPHSON. I refuse to be sworn.
>
> Mr. STRIPLING. You refuse to give testimony before this sub-committee?
>
> Mr. JOSEPHSON. Until I have had an opportunity to determine through the courts the legality of this committee.

The subcommittee then excused petitioner, subject to recall by the full committee or the subcommittee (R. 182).

Petitioner was convicted and sentenced to imprisonment for a term of twelve months and to pay a fine of $1,000 (R. 196). Upon appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was affirmed, Judge Clark dissenting (R. 201–230).

ARGUMENT

1. Petitioner has been convicted of contempt of Congress for his refusal before one of its Committees "to answer any question pertinent to the question under inquiry." As a defense to the charge he contends, in effect, that the Committee was without power to conduct any inquiry because the resolution defining the scope of its inquiry was so broad and vague as to permit it to inquire into matters protected by the First Amendment. We doubt, however, that petitioner has any standing to raise this question, since he has not shown that the Committee violated or threatened to violate any right guaranteed to him. Had petitioner submitted to questioning, he could then have refused to answer specific questions which he believed invaded his rights. If cited for contempt for failure to answer any such question, he could have defended on the grounds (1) that the specific question was not pertinent to any

subject which might properly be investigated by the Committee pursuant to its statutory authority; and (2) that if the resolution establishing the Committee was properly interpreted as authorizing the specific question, then the resolution to that extent was in conflict with the Constitution. *Sinclair* v. *United States,* 279 U. S. 263, 292. But petitioner chose to assert illegality of the Committee before any of his rights were infringed or threatened by the Committee. Under these circumstances it is questionable whether he has standing to raise any question as to the legality of the Committee or of its activities, "for it is the well-settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of." *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571, 576. Petitioner "can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage." *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, 289. Cf. *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 544; *Louis. & Nash. R. R. Co.* v. *Finn,* 235 U. S. 601, 610; *Hendrick* v. *Maryland,* 235 U. S. 610, 621; *Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152, 156–157; *Arizona Employers' Liability Cases,* 250 U. S. 400, 429.

The cases cited by petitioner as supporting his standing to raise these objections (Pet. 22), are distinguishable. Thus, in *McGrain* v. *Daugherty*, 273 U. S. 135, defendant's standing to raise objections appears not to have been questioned. Further, the basic issue was whether Congress had power under any circumstances to compel appearance and testimony before it. In the instant case the inherent power of Congress to conduct investigations and to subpoena witnesses in connection therewith is not disputed. Petitioner's objection is simply that the particular resolution authorizing this Committee's investigation is unconstitutional. Similarly, jurisdictional questions, as opposed to issues of substantive validity of specific laws, were involved in *In re Sawyer*, 124 U. S. 200; *Ex parte Fisk*, 113 U. S. 713; and *Ex parte Rowland*, 104 U. S. 604.[1] The other cases cited by petitioner as supporting his contention of standing to contest the validity of the Committee's activities in this case all significantly involved situations in which a statute had been applied to a particular person so as to

[1] Cf. *United States* v. *United Mine Workers of America*, 330 U. S. 258, 293: "* * * an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings. This is true without regard even for the constitutionality of the Act under which the order is issued." See also *United States* v. *Shipp*, 203 U. S. 563, 573.

impinge on his constitutional rights;[2] i. e., the person complaining had been injured. In the present case petitioner has been affected only by having been required to appear before the Committee and answer questions which it must be presumed would have been pertinent to the subject under inquiry by the Committee. Such mandatory appearance did not *per se* conflict with any right guaranteed petitioner, i. e., petitioner was not hurt merely by being required to appear and testify.

The majority below recognized that the decision in this case might well rest on petitioner's lack of standing to raise objections to the legality of the Committee and its activities (R. 212). The dissenting opinion of Judge Clark (R. 226–227) itself makes it clear that petitioner's purported standing to raise the issues is based not on any actual infringement of his constitutional rights, but rather on an anticipation that the Committee would ask specific questions which might invade

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[2] *Thornhill* v. *Alabama*, 310 U. S. 88—under the contested statute defendant's constitutional right to free speech had been denied.

Thomas v. *Collins*, 323 U. S. 516—the restraining order which defendant violated prohibited his exercise of the constitutionally guaranteed right to free speech.

Lovell v. *Griffin*, 303 U. S. 444—defendant was convicted, under the statute objected to, for having exercised his constitutional right of free speech.

Smith v. *Cahoon*, 283 U. S. 553—defendant's right to operate motor vehicles without complying with certain conditions imposed by the statute objected to had been denied.

his rights. Fear of anticipated injury is not sufficient to establish a right to raise a constitutional issue.

2. Assuming, *arguendo,* that petitioner has standing to challenge the authority of the Committee, the critical question which remains is one of power—the power of Congress to authorize the investigation in which petitioner refused to testify. In approaching this question, it is to be observed that there is no question here of the right of the Committee to propound or of the duty of petitioner to answer any *specific* question, for he withdrew from the inquiry before any specific questions were asked of him. Thus, it must be assumed that any question which might have been asked would have been pertinent to the inquiry and otherwise legitimate. And the sole question here is whether the Committee had the power to propound a question to petitioner which would have been consistent with the authority lodged in it. See *McGrain* v. *Daugherty,* 273 U. S. 135, 160.

The power of either branch of Congress to institute investigations and to compel evidence with a view to the possible exercise of the legislative function is indisputable. *McGrain* v. *Daugherty,* 273 U. S. 135, 171–175; *United States* v. *Norris,* 300 U. S. 564, 573. The necessity for the power exists in the very nature of the legislative function. As this Court stated in *McGrain* v. *Daugherty,* 273 U. S. at 175:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.

It is in this context that the contentions in respect of Public Law 601 must be appraised. The Committee on Un-American Activities has been authorized to conduct investigations of—

> (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

The purpose of the provision is apparent from its face—to secure information of a specified kind in order that any necessary remedial legislation may be enacted. It is urged that the authoriza-

tion is so broad as to be unlimited and thus to furnish petitioner no guide as to the permissible area for inquiry. But a fair regard for the words of the statute refutes the argument. The Committee is limited in its inquiry to propagandizing activity, and, further, only to propaganda activities which seek to subvert or undermine the principle of the form of government as guaranteed by our Constitution. It is not mere thought, but propaganda activities, which are the subject of the inquiry. And not all propaganda activities are pertinent; only those which seek to subvert the constitutional principle of our form of Government are subject to investigation.

In this age of propaganda warfare there is a knowable content in the statutory word "propaganda." It is not an indefinite concept which includes everything. And similarly it is difficult to believe that anyone would read the phrase "the principle of the form of government as guaranteed by our Constitution," as meaning anything other than the republican form of government, which, too, has specific content. "* * * the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves." *In re Duncan,* 139 U. S. 449, 461. Cf. Chief Justice Stone dissenting in *Schneiderman* v. *United*

States, 320 U. S. 118, 181. The words "subversive and un-American" which qualify "propaganda," when read in their context, are descriptive of the propaganda activities which are subject to investigation. While considered in isolation these words may have broad and different meanings to different people, there can be little question that they are calculated to authorize the Committee to seek information concerning propaganda activities which undermine the principle of the republican form of government. There is nothing in this case to indicate that anything other than such information was sought from petitioner.

In the view we take of the statute, it marks off a specified area of conduct for investigation and so informs the world. Obviously the statutes or resolutions establishing the authority of legislative committees are not bound by the same requirements as to definiteness as criminal laws, so long as the crime of not answering questions is sufficiently defined as it is here.[3] If there were any constitutional requirement that Congress clearly define the fields of inquiry of its investigating committees, acting within the constitutional authority of Congress, the standard of definiteness required would be more like that applied to statutes delegating authority to administrative

[3] There is no claim here that R. S. § 102, the criminal statute involved, is not sufficiently definite.

agencies.[4] Cf. *Fahey* v. *Mallonee*, 332 U. S. 245, 250.

It is said, moreover, that the statute permits an inquiry into sensitive matters which are protected by the First Amendment and imposes a limitless restraint on mere thought and opinion. And elaborate arguments are presented by petitioner and by the dissenting judge below which seek to emphasize the evils which result from imposing restraints on freedom of thought and speech. But this entire line of argument misapprehends what is self-evident. The statute imposes no restraints. After testifying before the committee a witness can believe, say and do the same things as he could before. The statute permits investigation only; it does not impose any limits on freedom of speech. Indeed, the statute does not permit the Committee to control even the propaganda activities which are the subject matter of its investigations. Since there is no interference with First Amendment rights, the statute cannot be in violation of the Amendment.

We are thus brought to the vital issue in the case: Does the statute authorize the ascertainment of facts which can be of aid to the Congress

[4] Although we do not believe determination of that issue necessary to disposition of this case, we doubt that resolutions establishing congressional committees are subject to a requirement of definiteness. Compare e. g., the jurisdiction exercised by the House Ways and Means and Appropriations Committees.

in legislating? If it seeks information concerning matters which are not fit subjects of legislation, the courts may, of course, strike it down. *Kilbourn* v. *Thompson,* 103 U. S. 168. But if there is an area for legislative action, no matter how circumscribed, it is the responsibility of the courts not to interfere. The wisdom of conducting the investigation is for the judgment of Congress. Both petitioner and the dissenting judge below seemingly assume that their distaste for the Committee and its activities justifies judicial interference. A decent respect for the judgment of the legislative branch of our government requires, however, that policy decisions concerning the functioning of the Committee should be left to Congress, whose creature the Committee is.

Notwithstanding that the area for legislation concerning propaganda activities may be narrow, there is a well recognized field for legislation. From the information which the Committee receives, it conceivably could conclude that certain propaganda activities have reached the stage where they present a "clear and present" danger of bringing about a substantive evil, such as the overthrow of our form of government by means inconsistent with the Constitution and that remedial legislation is necessary. Cf. *Dunne* v. *United States,* 138 F. 2d 137 (C. C. A. 8), certiorari denied, 320 U. S. 790. The Committee may learn that foreign governments are carrying on propaganda warfare in our midst with a view

to undermining our constitutional principles through aliens who enter our shores. Such information could result in the amendment of our immigration laws to close even more tightly our boundaries to classes of persons believed to be engaged in such activities. The data disclosed by the investigation might show the necessity for increasing our internal security forces, and legislation and appropriations for this purpose could be initiated, or it might show that there is no need for additional legislation. Other examples are collected in the opinion of the court below (R. 211–212). The short of the matter is that even in the area of speech Congress is not impotent to deal with serious dangers to the nation. This being so, it cannot be said that the Committee's inquiry was not in aid of possible legislation.

We have, then, a statute authorizing investigation, not into beliefs, but into action. The authorization is limited to a specific evil—propaganda activity which seeks to undermine our form of government. And the information to be obtained from such an investigation is capable of being in aid of possible remedial legislation. This being so, the Committee was fully empowered to summon petitioner and to seek information from him. Only if a specific question put to petitioner by the Committee exceeded the bounds of the Committee's power or was not pertinent to the inquiry would he have justification for refusing to answer. *McGrain* v. *Daugherty,* 273 U. S. at

176; *Sinclair* v. *United States,* 279 U. S. 263, 292.

3. The contention (Pet. 24–26) that the indictment and proof failed to establish an offense within the purview of R. S. § 102 is, as the opinion below demonstrates (R. 203–204),[5] without merit.

R. S. § 102 describes two different offenses. The first clause, relating to one who has been summoned before a Committee and wilfully makes default, reaches the act of a person who, having been subpoenaed, fails to appear, as in *McGrain* v. *Daugherty,* 273 U. S. 135, or who appears but fails to remain in attendance until excused, as in *Townsend* v. *United States,* 95 F. 2d 352 (App. D. C.), certiorari denied, 303 U. S. 664. The second clause punishes anyone who, having appeared, "refuses to answer any question pertinent to the question under inquiry." It reaches the conduct of anyone who appears before a Committee, whether or not pursuant to a summons (*Sinclair* v. *United States,* 279 U. S. 263, 291), and refuses to give information pertinent to the inquiry. Petitioner was convicted for this offense.

It is plain that petitioner did not fail to appear in response to the summons, nor did he fail to remain in attendance after having appeared.

[5] The dissenting judge did not disagree with the court on this issue.

Petitioner appeared and was subsequently excused, subject to call by the full committee or the subcommittee (*supra*, pp. 6–7). His misconduct consisted of his refusal to give information to the subcommittee which was pertinent to the inquiry, and this is within even the literal terms of the second clause of R. S. § 102. In the words of the statute, he refused "to answer any question pertinent to the question under inquiry."

It is no answer to urge, as does petitioner (Pet. 25–26), that he was not charged with refusal to answer any specific question. The statute does not limit itself to a specific question. It strikes as vigorously at the refusal to answer all questions as it does at the refusal to answer any one question. By refusing to be sworn or to testify, petitioner plainly violated the statute.

Petitioner's complaint (Pet. 25) that by prosecuting him under the second clause of the statute rather than the first the Government eliminated the element of wilfulness from the case and prevented him from showing that he did not act wilfully is more imaginary than real. In the first place, the facts foreclose any conclusion other than that petitioner acted wilfully. For with the advice of counsel he unqualifiedly refused to be sworn or to answer any questions in order to test the legal authority of the Committee. A plea at this point of surprised innocence hardly is consistent with the avowed purpose to defy the Committee. And, secondly, substantially the

same element of purposeful misconduct is included in the offense for which petitioner was convicted. The second clause reaches only a person who "refuses" to answer any question pertinent to the inquiry. To refuse contemplates something more than an innocent failure to comply. It requires that the witness shall be aware of his obligation to answer questions and shall purposefully decline to do so. As this Court has held, it requires an intentional violation. *Sinclair* v. *United States,* 279 U. S. 263, 299. The jury was instructed, in the language of the *Sinclair* opinion, that (R. 140)—

> The gist of the offense is refusal to answer any questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt.

The same instruction as to wilfulness would have been appropriate if the prosecution had been under the first clause of the statute. See *Fields* v. *United States,* 164 F. 2d 97, 100 (App. D. C.), certiorari denied, January 12, 1948, No. 458, this Term.*

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* The court properly did not instruct the jury that they must find petitioner not guilty if they were satisfied that he had not been lawfully summoned to the inquiry (R. 144; see R. 140), for the validity of the summons is not an issue in the case. This Court has held that "Section 102 plainly extends to a case where a person voluntarily appears as a witness without being summoned as well as to the case of one required to attend." *Sinclair* v. *United States*, 279 U. S. 263, 291.

CONCLUSION

Petitioner has defied the authority of a duly constituted Committee of the House of Representatives. Nothing adduced at the trial shows that the Committee attempted to inquire concerning any matter other than that properly authorized by Congress. The authorization was to secure information properly in aid of the legislative function, for even in the area of speech Congress may, as it has, legitimately enact remedial measures to combat threatened dangers to our institutions.

The decision below was clearly correct. We respectfully submit that the petition for certiorari should be denied.

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Solicitor General.
T. VINCENT QUINN,
Assistant Attorney General.
ROBERT S. ERDAHL,
IRVING S. SHAPIRO,
Attorneys.

FEBRUARY 1948.

U. S. GOVERNMENT PRINTING OFFICE: 1948

IN THE

Supreme Court of the United States

OCTOBER TERM—1947

No. 535

LEON JOSEPHSON,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING

SAMUEL A. NEUBURGER,
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IN THE

Supreme Court of the United States

OCTOBER TERM—1947

No. 535

LEON JOSEPHSON,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Leon Josephson, prays for a rehearing and reversal of the order hereinbefore entered on the 16th day of February, 1948, denying his petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit. This petition for rehearing is based upon a substantial ground available to petitioner although not previously presented.

The Circuit Court below held that the petitioner did not have available to him the claim that Public Law 601 violated the provisions of the Fifth and Sixth Amendments to the Constitution (R. 207). In addition, it doubted that petitioner was sufficiently injured to raise the claim that the authorizing statute violated the First Amendment (R. 212), but it resolved that issue in petitioner's favor and discussed the merits (R. 212-215).

In the petition filed with this Court for a writ of certiorari, we limited our discussion, therefore, as far as the right of the petitioner to question the validity of the Committee was concerned, to a discussion of his right to make the claim that the statute violated the due process provisions of the Fifth Amendment and the pertinent provisions of the Sixth Amendment (Petition, p. 7, Question No. 9; Petition, Point 3, pp. 9-10; Brief, subd. (f), p. 22). We did not present the separate and distinct ground, sustaining the petitioner's right to assert the claim that the statute violated the First Amendment, because that matter, we believed, had been resolved sufficiently in our favor by the Court below.

If this Court is of the view that petitioner is not in the position to question the validity of the statute so far as the Fifth and Sixth Amendments are concerned, it should nevertheless sustain, it is respectfully submitted, petitioner's right to assert the invalidity of the statute under the First Amendment to the Constitution.

In *McGrain* v. *Daugherty*, 273 U. S. 135 (1927), the Government was represented by Attorney General Harlan F. Stone, later the Chief Justice of this Court. In his brief before this Court (p. 74), and in his argument before this Court (*supra*, p. 144), the Attorney General stated

> "Appellee, by refusing to appear in response to either subpoena and be sworn to testify, can only succeed in this case by establishing that the entire proceeding was void, as beyond the constitutional powers of the Senate."

Here we have an explicit admission by the Government that a witness who refused to be sworn and testify could raise, indeed, could *only* raise the question of the validity of the proceedings. *Daugherty* claimed that the Senate had exceeded its constitutional powers by authorizing an inquiry in aid of legislation. The petitioner here claimed

that the House had exceeded its constitutional powers by authorizing a limitless inquiry solely into opinion and belief, an inadmissible and unlawful object under the Constitution.

The petitioner made the claim that the Committee was without jurisdiction, that its proceedings were void and its process, therefore, a nullity.

If a citizen is compelled by subpoena to leave his home or business to attend a proceeding before a legislative committee whose avowed aims are "exposure" and "pitiless publicity," it is clear, it is respectfully submitted, that he suffers an injury sufficient to raise the constitutional issue. For the petitioner is not a "stranger" to this Committee. It must be remembered that the contempt statute (Title 2, United States Code, Section 192), was invoked against him and he has been sentenced to fine and imprisonment under it. He has suffered no less an injury than the defendant in *Thornhill* v. *Alabama,* 310 U. S. 88 (1940), or the defendant in *Thomas* v. *Collins,* 323 U. S. 516 (1945). *Cf. Pierce* v. *Society of Sisters,* 268 U. S. 510, 535 (1925).

We respectfully submit in the light of the decisions in *McGrain* v. *Daugherty, supra* (and Mr. Justice STONE's argument before this Court when he was Attorney General), *Thornhill* v. *Alabama, supra,* and *Thomas* v. *Collins, supra,* that petitioner had the right to assert that Public Law No. 601 violated the provisions of the First Amendment, and that the proceedings of the Committee were, therefore, void.

We further submit, respectfully, that this issue alone—the right to assert the claim of unconstitutionality—poses a novel issue of public importance, an issue which should be decided by this Court, for the applicable decisions appear to support petitioner's right to assert the claim.

Conclusion

This Court has stated that "under our constitutional system, courts stand against any winds that blow . . ." (*Chambers* v. *Florida*, 309 U. S. 227, 241, 1940). This Court, it has been declared, should not permit "its claim to guardianship of free speech and press "to become a hollow one" (*Thomas* v. *Collins*, 323 U. S. 516, 547, 1945). Grave issues affecting the civil liberties of the entire people are involved here. The Bill of Rights is at stake. At least, such was the view of Judge CLARK in his painstaking and sober opinion in the Court below. The view is receiving growing support from public citizens (*Henry Steele Commager, Who Is Loyal to America?, Harper's Magazine*, September 1947), and from the Bar (Note, *14 University of Chicago Law Review* 265 (Feb., 1947); Note, *47 Columbia Law Review* 416 (April, 1947); *Gellhorn, Walter, Report on a Report of the House Committee on Un-American Activities, 60 Harvard Law Review* 1193 (October, 1947); Note, *96 University of Pennsylvania Law Review* 381, (Febuary, 1948). If this Court does not speak out, there is danger that the inquisition here established into the beliefs and faiths of citizens will soon be emulated on a wide scale by state and local officials of government. The "Loyalty Order," "subversive lists," "loyalty checks," "alien roundups without bail" all are straws in the wind—a developing hysteria and oppression where freedom cannot prevail. The courts of the land, now more than ever, need the strength, the advice and guidance of the supreme interpreters of the Constitution. We urge this Court to permit us to come before it and fully discuss the most crucial constitutional issue affecting the country in over two decades.

WHEREFORE, it is respectfully prayed that this petition for rehearing be granted and that the order of this Court

denying the petition of a writ of certiorari to the Circuit Court of Appeals for the Second Circuit be reversed, and the petition granted.

February, 1948.

LEON JOSEPHSON,
Petitioner.

SAMUEL A. NEUBURGER,
BARENT TEN EYCK,
Attorneys for the Petitioner.

SAMUEL ROSENWEIN,
Of Counsel.

Certificate

We hereby certify that the foregoing petition is presented in good faith and not for delay, and that the foregoing petition is restricted to a sustantial ground available to petitioner although not previously presented, in accordance with Rule 33, paragraph 2 of the Rules of this Court.

SAMUEL A. NEUBURGER,
BARENT TEN EYCK,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM—1947

No. 535

LEON JOSEPHSON,

Petitioner,

v.

UNITED STATES OF AMERICA.

APPLICATION TO FILE BRIEF OF JOINT ANTI-FASCIST REFUGEE COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REHEARING, AND BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM—1947

No. 535

LEON JOSEPHSON,

Petitioner,

v.

UNITED STATES OF AMERICA.

APPLICATION TO FILE BRIEF OF JOINT ANTI-FASCIST REFUGEE COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REHEARING, AND BRIEF

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Joint Anti-Fascist Refugee Committee, an unincorporated association which is devoted to the collection and distribution of funds, clothing, food, and medical supplies on behalf of refugees from Spain, prays for leave to file a brief as *amicus curiae* in the above entitled case.

This application is made because there is presently pending before the Court of Appeals for the District of Columbia an appeal, by several members of the Executive Board of the Joint Anti-Fascist Refugee Committee, which

involves many of the constitutional questions raised here by petitioner. The disposition of this petition seriously affects the outcome of that pending appeal. For if the petition is denied, the refusal of this Court to hear petitioner's arguments based upon the First, Fifth, Sixth, Ninth and Tenth Amendments to the United States Constitution may be construed as a determination against similar contentions urged by the Joint Anti-Fascist Refugee Committee before the Court of Appeals. It is respectfully requested, therefore, that this application be granted.

Brief for *Amicus Curiae*

The petition for rehearing has properly addressed itself, under Rule 33 of the Rules of this Court, to a substantial ground not previously presented by the petition for a writ of certiorari. The petition for the writ did not indicate to this Court that the petitioner was entitled to assert the unconstitutionality of Public Law 601* as violative of the First Amendment. Upon his petition for rehearing, the petitioner has urged that the posture of this case impels this Court to consider whether Public Law 601 violates the First Amendment and the Joint Anti-Fascist Refugee Committee joins in that contention.

The fact that petitioner refused to submit to the jurisdiction of the House Committee does not affect his status to contest the constitutionality of the legislation which brought the House Committee into being. This Court has frequently considered the constitutionality of a statute upon the prosecution of one who deliberately refused to submit to the jurisdiction of the agency administering that statute. In *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), it was said of the licensing cases "One who might have had a license for the asking may therefore call into question

* The statutory authority for the investigation conducted by the House Committee will hereinafter be referred to as "Public Law 601."

the whole scheme of licensing when he is prosecuted for failure to procure it. *Lovell* v. *Griffin*, 303 U. S. 44; *Hayne* v. *C. I. O.*, 307 U. S. 496." In *N. L. R. B.* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1 (1938), the constitutionality of every aspect of the National Labor Relations Act was examined by this Court upon the instance of parties who had refused to recognize or submit generally to the jurisdiction of the Board. (See also *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936), at pages 287-288.)

Similarly, the fact that petitioner did not take the oath which the House Committee sought to administer to him, and thereafter was not questioned by the House Committee, does not preclude him from testing the power of the House Committee to ask questions of him. It is immaterial that the questions may not have followed the pattern of inquisition into ideas, beliefs, opinions and expression established by this House Committee over the course of the decade of its existence; it is sufficient that under the powers afforded the House Committee by Public Law 601 it could ask such questions. "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of expression." (*Thornhill* v. *Alabama*, *supra*.) The instant prosecution raises constitutional questions under the First Amendment in a manner which is precisely analogous to the licensing cases thus summarized.

The petitioner is, then, entitled to assert the conflict between the powers accorded the House Committee to ask questions of him and the First Amendment, particularly in this prosecution. For the Court is here asked by the Government to sanction a conviction which is based upon the power asserted by the House Committee to compel testimony. A case reaching this Court under such circumstances is an appropriate occasion for the consideration of the constitutional propriety of the assertion of that power.

The petitioner should not be denied an opportunity—and thereby be deprived of his liberty without a ruling by this Court—to have the highest Court pass upon the constitutionality of an agency most menacing to American civil liberties because of the method he chose to insist upon his rights under the First Amendment. Had he proceeded to take the oath and testify, the Government might have contended, as was suggested by the dissenting opinion in the court below, that he had "waived any objection of validity." And once having testified he may have been foreclosed from enjoining the House Committee from subjecting him to the notoriety which it uses to discredit persons or ideas of which it does not approve (*Hearst* v. *Black*, 87 F. (2) 68 (App. D. C. 1936; *but cf. Utah Fuel Co.* v. *National Bituminous Coal Comm.*, 306 U. S. 56 (1939)), nor would the remedy of libel have been available to him against the House Committee, any of its members (*Spalding* v. *Vilas*, 161 U. S. 483 (1896); *Mellon* v. *Brewer*, 18 F. (2) 168 (App. D. C. 1927) cert. den. 275 U. S. 530 (1927); *Glass* v. *Ickes*, 117 F. (2) 273 (App. D. C. 1940) cert. den. 311 U. S. 718 (1942)), or newspapers publishing information disseminated by the House Committee (*Cresson* v. *Louisville Courier-Journal*, 299 F. 487 (C. C. A. 6, 1924)). It would be anomalous if petitioner had to initiate such a remediless chain of events in order to test the constitutional power of the House Committee to examine him.

The instant prosecution, premised as it ultimately is, upon the power of the House Committee to investigate without limit into constitutionally safeguarded opinion and speech, is a sufficient occasion for this Court to examine the constitutionality of such power.

CONCLUSION

The petition for rehearing and certiorari should be granted.

Respectfully submitted,

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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 535.

LEON JOSEPHSON, *Petitioner*

v.

THE UNITED STATES OF AMERICA.

MOTION OF NATIONAL LAWYERS GUILD FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF AMICUS CURIAE.

NATIONAL LAWYERS GUILD,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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v.

THE UNITED STATES OF AMERICA.

MOTION OF NATIONAL LAWYERS GUILD FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF AMICUS CURIAE.

APPLICATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The National Lawyers Guild prays for leave to file a brief as amicus curiae in connection with the petitioner's application for re-hearing upon the denial of his petition for writ of certiorari in the above entitled case. The National Lawyers Guild is an organization of members of the bar devoted, among other things, to the protection of our democratic institutions and the civil rights and liberties of all the people. Because it believes that the denial of certiorari in the instant case leaves undecided an issue of the greatest importance to the American people, and to the maintenance of our civil liberties, it respectfully requests leave to file a brief as amicus curiae in support of the petitioner's application for rehearing.

BRIEF.

This Court grants review on writ of certiorari in its "sound judicial discretion" and "only where there are special and important reasons therefor." Such reasons generally exist when a circuit court of appeals "has decided an important question of federal law which has not been, but should be, settled by this court; or a federal question in a way probably in conflict with applicable decisions of this court." Supreme Court Rule 5.

So far as the standard of probable error below is concerned, we are content to rest on the persuasive dissenting opinion of Judge Clark. As for the issues involved, chief among them is the challenge to the constitutionality of the resolution under which the House Committee on Un-American Activities compels testimony. The importance of this question was recognized by both the majority judges and the dissenting judge in the decision below. The majority opinion refers to it as "this exceedingly important point," and Judge Clark's dissent calls it "one of the more momentous which has come before us."

In our view, this issue is of such transcending public importance as to place on this Court a responsibility to accept the earliest occasion offered for its review.

(1) Our most cherished freedoms are today threatened by post-war currents of political and economic insecurity, instability and reaction. Following the First World War, an intense agitation against "radicalism" led to shameful episodes in our national history: the Palmer raids, the ouster of Socialists from the New York legislature, various convictions under state "anti-radical" or "anti-syndicalism" statutes, the executions of Sacco and Vanzetti, etc. Today's even greater agitation against alleged Communists and Communism, occurring in a period of greater stress, is even more dangerous to the civil liberties of the people.

The President's Committee on Civil Rights has recently reported that public excitement about "Communists" has engendered "a state of near-hysteria" which "threatens to inhibit the freedom of genuine democrats." *To Secure These Rights* (1947) 49. More than any other single agency or group, the House Committee on Un-American Activities has contributed to this near-hysteria. It is this atmosphere which has given rise to the President's recent "loyalty" order, to the publication thereunder by the Attorney-General of names of so-called "subversive" organizations, to the wave of deportation proceedings against alien dissidents, to the Taft-Hartley Act's anti-communist affidavits, to executive attempts to cancel tax exemptions heretofore enjoyed by certain left-wing educational or charitable organizations, to the large number of contempt prosecutions against persons who have refused to disclose their political views and affiliations, and to the movie industry's recent discharge of ten leading artists. The distorting "exposures" of the Committee[1] have imperiled the survival of virtually every organization with reformist political and economic aims.

The fact is, of course, that the Committee is not an investigating committee at all. Instead, under an investigative guise it operates as an agency of Congress to suppress reformists, progressives, and radicals by use of propaganda, censorship through "exposure,"[2] and economic blacklisting.[3]

---

[1] See Gellhorn, *Report on a Report of the House Committee on Un-American Activities*, 60 Harv. L. Rev. 1193.

[2] Regulation by "exposure" in fields immune to direct Congressional regulation is the Committee's self-admitted chief function. H. R. Rep. No. 2742, 79th Cong., 2d Sess., p. 16 (1947); H. R. Rep. No. 2, 76th Cong., 1st Sess., p. 13 (1939); H. R. Rep. No. 1, 77th Cong., 1st Sess., p. 24 (1941); 83 Cong. Rec. 7570 (1938) (Representative Dies).

[3] Note, *Constitutional Limitations on the Un-American Activities Committee*, 47 Col. L. Rev. 416, 418, 419 (1947).

Surely the question of the validity of the authority of a Committee which is so powerful, so effective, so controversial, and, in the eyes of many, so dangerous, is "an important question of federal law" which "should be settled by this court." Or if there is a question as to who can challenge the Committee's authority, that itself is a question of almost equal importance.

(2) In *Jurney* v. *MacCracken*, 294 U. S. 125, 150, Justice Brandeis, speaking for the Court, gave assurance that the ground for fears of abuse of the Congressional investigating power had been "effectively removed by the decisions of this Court which hold that assertions of congressional privilege are subject to judicial review." We suggest that this assurance is largely negatived if, in such an extreme and important application of the Congressional investigating authority, this Court refuses to review a decision by a Circuit Court of Appeals, one member of which wrote a vigorous dissent.

The importance of freedom from "unlawful inquisitorial investigations" and from "unauthorized, arbitrary or unreasonable inquiries" has been recognized by this Court. *Jones* v. *S. E. C.*, 298 U. S. 1, 28; *Sinclair* v. *United States*, 279 U. S. 263, 292; see *F. T. C.* v. *American Tobacco Co.*, 264 U. S. 298, 305, 306. The Committee on Un-American Activities engages in inquisitorial investigations which probe deeply into belief and expression, and its statutory authority permits its practices. The Committee's authority to investigate "propaganda" is qualified only by two adjectives—"un-American" and "subversive." These words are, in usage, in the Committee's practice, and by legislative history, synonymous with "distasteful." Hence the Committee is limited only by its own self-imposed restrictions.[4] Not in American history has any other Congressional committee exercised so vast an investigative jurisdiction. As Judge Clark remarked in his dissent, "the neces-

[4] Note, *Constitutional Limitations on the Un-American Activities Committee*, 47 Col. L. Rev. 416, 419-423.

sity of decision becomes all the more pressing when, as I think it obvious, no more extensive search into the hearts and minds of private citizens can be thought of or expected than that we have before us."

If Congress may validly engage in such roving and unrestricted inquiries, with full utilization of the subpoena power, then there is no longer any force in the doctrine repeatedly enunciated by this Court that Congress' investigative power is ancillary, limited, and subject to judicial review. *Kilbourn* v. *Thompson*, 103 U. S. 168; *McGrain* v. *Daugherty*, 273 U. S. 135; *Jurney* v. *MacCracken*, 294 U. S. 125; *Sinclair* v. *United States*, 279 U. S. 263; *In re Chapman*, 166 U. S. 661. For in the instance of this Committee the assertion of Congressional investigative authority has reached the ultimate, and this in a field—the expression of ideas—which Constitutionally presents extraordinary resistance to legislative intrusion.

Surely so great a reversal of established Constitutional doctrine should be passed on by this Court.

(3) Finally, a decision by this Court on the validity of the Committee's authority is important to the administration of law. In the District of Columbia courts there are now pending at various stages of trial, pre-trial, or appeal, sixteen criminal prosecutions, involving twenty-seven defendants, for contempt of the Committee on Un-American Activities. In each of these cases, there has been or will be raised the defense that the Committee's powers are invalid.

The respondent challenges the standing of the petitioner to question the validity of the Committee. It asserts that constitutional issues may be raised only with respect to specific questions asked of a summoned witness and are thus not available to the petitioner, who refused to be sworn and announced at the outset that he would not answer any questions.

The petitioner's actions were, of course, simply a refusal to respond to the Committee's subpoena. It is abundantly

clear that a person who has refused to respond to a subpoena may challenge the validity of the subpoena. *Cf. Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186; *F. T. C.* v. *American Tobacco Co., supra; Jones* v. *S. E. C., supra; Hale* v. *Henkel*, 201 U. S. 43. A contrary holding would be tantamount to a partial repeal of the Fourth Amendment. And this Court has subjected to review the investigative authority of a Congressional committee as a whole when its right to summon was contested. *Kilbourn* v. *Thompson, supra; McGrain* v. *Daugherty, supra.* If these rules of law, established by this Court, are to be reversed, so that henceforth no person may challenge the right of a Congressional committee to compel attendance, it is this Court alone which is the appropriate tribunal to effect the reversal.

CONCLUSION.

The order denying certiorari should be vacated, and certiorari should be granted.

Respectfully submitted,

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